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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 684

MARY JANE HEISLER,

Appellant,

against

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

LEO PFEFFER,
American Jewish Congress,
15 East 84th Street,
New York 28, New York;

SCHERMER, GOLDSTEIN AND MILLSTONE,
1007-8 Mahoning Bank Building,
Youngstown 3, Ohio,
Attorneys for Plaintiff-Appellant.

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SUPREME COURT OF THE STATE OF OHIO

MARY JANE HEISLER,
Plaintiff-Appellant,

against

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith her statement setting forth the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Ohio, affirming the decision of the Court of Appeals of Mahoning County, Ohio, which in turn affirmed the judgment of the Court of Common Pleas of Mahoning County upholding a decision by the Board of Review of the Ohio Bureau of Unemployment Compensation denying unemployment compensation benefits to plaintiff-appellant.

Opinions Below

Neither the Court of Common Pleas decision nor the Journal Entry affirmance without opinion of that decision by the Mahoning County Court of Appeals is officially reported. A copy of the opinion of the Court of Common Pleas is appended hereto as Appendix "A". A copy of the Court of Appeals Journal Entry is attached hereto as Appendix "B". The memorandum decision of the Su-

preme Court of Ohio is reported at 156 Ohio St. 395 and is attached as Appendix "C".

Statement

Plaintiff-appellant was employed by the Cleveland Wood Artesian Company of Cleveland, Ohio from December 1947 to May 1948. Upon the termination of her employment she became entitled to unemployment compensation benefits under the provisions of the Ohio General Code. On July 13, 1948 she filed a claim for such benefits and registered with an employment office in accordance with the regulations prescribed by the unemployment compensation Administrator.

On November 13, 1948 the employment office referred plaintiff to the St. Elizabeth's Hospital for employment as a clerk and general office worker. Plaintiff was informed by the employment office that the position required working on Saturday. She refused to accept the job referral solely on the ground that her religious conviction prevented her from working on Saturday. In all other respects, plaintiff was ready and able to accept such a position and was reasonably fitted for it.

The Administrator denied plaintiff compensation benefits by order of November 24, 1948. That order stated:

> "Claimant on November 2, 1948 refused to accept a referral to a job opportunity for which she was reasonably fitted. Benefit rights shall be suspended as of that date until claimant secures employment and is otherwise eligible in accordance with Section 1345-6-d-(2) of the Unemployment Compensation Act."

Manner, Method and Time of Raising Questions Sought to Be Reviewed

Urging the same contentions as she now urges here, the plaintiff protested this decision by the Administrator. She contended by written statement that the denial of benefits constituted an interpretation of Section 1345-6 of the Ohio

General Code which rendered that Section violative of the First and Fourteenth Amendments to the United States Constitution. She also contended that the denial of benefits constituted an arbitrary infringement of her rights under those Amendments. (Record,[1] Fols. 41-42.)

After considering these contentions a Referee in the Bureau of Unemployment Compensation on March 17, 1949 sustained the decision of the Administrator. The Referee expressly declared that "an employee who refuses to work on Saturday, which is the day he observes as his Sabbath is not available during the entire week for work . . . as required by G. C. 1345-6-a-(4)" (Record, Fol. 44). This decision was upheld by the Board of Review of the Bureau of Unemployment Compensation on May 23, 1949 (Record, Fol. 50). The constitutional issues were raised before the Board of Review but were rejected (Record, Fols. 45 to 46).

On appeal to the Court of Common Pleas the Board's decision was affirmed on June 29, 1950. This holding was in turn affirmed by the Court of Appeals of Mahoning County on August 28, 1951 and by the Supreme Court of Ohio on December 12, 1951. Each of the constitutional contentions urged by the plaintiff was expounded before these courts both by oral argument and in her briefs. These contentions were considered and decided adversely to plaintiff by all three courts (Appendices A, B, C).

Statute Involved

The pertinent provisions of Section 1345-6 of the Ohio General Code are as follows:

Section 1345-6-a-(4)

"No individual shall be entitled to any benefits unless he or she . . . is able to work and available for work

[1] Citations to the Record throughout this statement refer to page numbers in the Record as it was prepared for presentation to the Courts of Ohio.

in his usual trade or occupation or in any other trade or occupation for which he is reasonably fit."

Section 1345-6

d) "Notwithstanding the provisions of subsection (a) of this section no individual may serve a waiting period or be paid benefits for the duration of any period of unemployment with respect to which the Administrator finds that such individual:

2) ". . . has refused to accept an offer of work for which he is reasonably fitted, or has refused to accept a referral to a job opportunity when directed to do so by a local employment office of this state or another state . . ."

Questions Presented

The following questions are presented by this appeal:

1. Whether Section 1345-6 of the Ohio General Code as construed in this case by the Courts of Ohio to require orthodox Jewish Sabbath observers to accept referrals for employment involving work on Saturday is a law that prohibits the free exercise of religion and is therefore invalid under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.

2. Whether Section 1345-6 of the Ohio General Code as construed in this case by the Courts of Ohio is a law respecting an establishment of religion in that it gives preferences to some religions over others and is therefore invalid under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.

3. Whether Section 1345-6 of the Ohio General Code as construed in this case by the Courts of Ohio is arbitrary and discriminatory in its treatment of various religious groups

and is therefore invalid under the "equal protection of the law" and "due process" provisions of the Fourteenth Amendment to the United States Constitution.

4. Whether Section 1345-6 of the Ohio General Code has been discriminatorily applied against plaintiff herein and persons similarly situated in violation of the "equal protection of the law" provision of the Fourteenth Amendment to the United States Constitution.

5. Whether Section 1345-6 of the Ohio General Code as construed in this case by the Courts of Ohio is invalid as a violation of the "equal privileges and immunities" provision of the Fourteenth Amendment to the United States Constitution.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on December 12, 1951. A petition for appeal to the United States Supreme Court is presented herewith, to wit, on February 25, 1952. The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *McCollum* v. *Board of Education*, 333 U. S. 203, 206 (1948); *Niemotko* v. *Maryland*, 95 U. S. Sup. Ct. (Law Ed.) 237, 238 (1951); *Williams* v. *New York*, 337 U. S. 241, 243 (1949); *Railway Express* v. *New York*, 336 U. S. 106, 108 (1949).

The Questions Are Substantial

A. As interpreted Sec. 1345-6 of the Ohio General Code prohibits the free exercise of religion.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." While the First Amendment applies only to Con-

gress, it is now well settled that the Fourteenth Amendment makes this prohibition applicable to the states. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (1943); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

Sec. 1345-6 of the Ohio Unemployment Compensation Law has been interpreted in this case to require an Orthodox Jew or other Seventh Day observer either to accept a job requiring work on Saturday or to suffer the penalty of forfeiture of all right to unemployment benefits. Plaintiff submits that this interpretation renders the statute violative of that provision of the First Amendment which guarantees "free exercise of religion." The Supreme Court of the United States has never before considered this question.

Defendant has placed great reliance on the decision in *Kut* v. *Bureau of Unemployment Compensation of the State of Ohio*, 146 O. S. 522 (1946). In that case, as in the case at bar, plaintiff was an orthodox Jew who refused to accept a job requiring work on Saturday. The court declared that the denial of unemployment compensation benefits did not constitute a violation of the First Amendment. The Supreme Court of the United States dismissed plaintiff's appeal. 329 U. S. 669 (1946).

It is submitted that the *Kut* case did not determine the issue presented in the case at bar. First, it is clearly settled that no inference can be drawn as to the merits of a case merely because the Supreme Court of the United States declines to review it. *State of Maryland* v. *Baltimore Radio Show*, 338 U. S. 912 (1950); see *Agoston* v. *Commonwealth of Pennsylvania*, 340 U. S. 844 (1950).

Moreover, there was an alternative ground for the *Kut* decision. The denial of compensation benefits was also predicated on the fact that the applicant had voluntarily

terminated his employment and therefore was not entitled to benefits under the statute. Two of the justices of the Supreme Court of Ohio concurred in the decision exclusively on that ground. *The United States Supreme Court, in dismissing the appeal, expressly declared "that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it."* 329 U. S. 669 (1946).

Thus the religious liberty issue is directly presented to the Supreme Court of the United States for determination for the first time in the case at bar. The Supreme Court has never previously considered nor indicated any opinion on this serious and substantial question of the First Amendment's scope and meaning. The right to religious liberty of the plaintiff and of others similarly situated depends on the Supreme Court's decision on this vital issue in the instant case.

Plaintiff submits that Sec. 1345-6 of the Ohio Unemployment Compensation Law, as construed by the Ohio courts, restricts the religious liberty of those whose conscience requires them to abstain from labor on that day. This conclusion follows, *a fortiori*, from the decided cases. The denial of unemployment compensation benefits to a Saturday observer certainly is a more serious sanction economically than the imposition of a license tax for preaching which the United States Supreme Court has twice held to constitute a restriction upon religious liberty. *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follet* v. *Town of McCormick*, 321 U. S. 573 (1944).

Concededly, the religious freedom guaranteed by the First Amendment does not embrace absolute "freedom to act"; all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304 (1940). The First Amendment does not preclude proscrip-

tion of polygamy, breaching of the peace or child labor. *Reynolds* v. *U. S.*, 98 U. S. 145 (1878); *Davis* v. *Beason*, 133 U. S. 333 (1890); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

However, when courts consider the validity of legislation regulating rights secured by the First Amendment, they do not apply the usual presumption of constitutionality. They recognize, rather, "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944). Hence, "any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

Unless, therefore, the record establishes the existence of a clear and present danger to the effective operation of the unemployment compensation law of Ohio, the statute as construed violates the religious guarantees of the Federal Constitution. Nothing in the record shows any such danger. Indeed, available knowledge indicates that the religious convictions of the plaintiff and others similarly situated could be respected without even inconveniencing the administration of the law.

The five-day week has received almost uniform acceptance in American industry. "At present, the 8-hour day, 5-day, 40-hour week have been established as the normal work-time schedule." *Collective Bargaining Provisions* (Preliminary Draft) U. S. Dept. of Labor, Nov. 1949, p. 1.

According to the Census of Religious Bodies, the United States Department of Commerce, Bureau of Census, there were in 1936 only 4,222 Seventh Day Adventists and 175,942

Jews in the State of Ohio. Only a small proportion of these are workers who are covered by the Unemployment Compensation Law. The population of Ohio, according to the 1940 census, was 6,907,612. Thus, even if all Seventh-Day Observers in Ohio found abnormal difficulty in obtaining 5-day-a-week employment it is clear that no undue burden upon the unemployment compensation administration would result.

The denial of benefits to plaintiff in the case at bar has been widely recognized as improper and unjustified. Most states in which the issue has been presented have ruled that religious conviction compelling refusal of a job requiring Saturday work does not disqualify an applicant from unemployment benefits.[2] In many of these states, there were far greater numbers of orthodox Jews and Seventh Day Adventists than in Ohio, but it was not found that any undue

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[2] *California*, Case #7643, Cal. A., Unemp. Comp. Int. Serv., Ben Serv., Vol. 5, No. 10;
Connecticut, Susman v. *The Administrator of Unemp. Corp.*, #463-C-45 (1945);
District of Columbia, Case #11372, D.C.A., Unemp. Comp. Int. Serv., Ben. Serv., Vol. 10, No. 4;
Georgia, Case #11931, Ga. A., id. at Vol. 10, No. 11;
Idaho, Case #12661, Ida. A., id. at Vol. 11, No. 8;
Illinois, Case #8303, Ill. A., id. at Vol. 7, No. 1;
Illinois, Case #10325, Ill. R., id. at Vol. 9, No. 3;
Kansas, Case #10451, Kans. A., id. at Vol. 9, Nos. 4-5;
Kentucky, Case #9596, Ky. A., id. at Vol. 8, No. 7;
Maryland, Case #11705, Md. R., id. at Vol. 10, No. 8;
Michigan, Case #8029, Mich. A., id. at Vol. 6, No. 6;
New Jersey, Case #8767, N.J.R., id. at Vol. 7, No. 9;
New York, Case #10197, N.Y. A. id. at Vol. 9, No. 1;
North Carolina, Case #No. 9007, N.C. A., id. at Vol. 7, No. 12;
Oklahoma, Case #7600, Okla. A., id. at Vol. 5, No. 10;
Oregon, Case #7512, Ore. A., id. at Vol. 5, No. 9;
Tennessee, Case #10055, Tenn. R., id. at Vol. 8, No. 11;
Tennessee, Case #12796, Tenn. R., id. at Vol. 11, No. 9;
Virginia, Case #11273, Va. A., id. at Vol. 10, No. 2 ;
Washington, Case #9107, Wash. R., id. at Vol. 8, No. 1;
West Virginia, Case #7267, W. Va. A., id. at Vol. 5, No. 5;
Wisconsin, Case #10154, Wisc. A., id. at Vol. 8, No. 12.

burden on the unemployment compensation fund would result from the granting of benefits to such Saturday observers.

The Pennsylvania Unemployment Compensation Board of Review expressly held that a claimant who refused Saturday employment on religious grounds could not be denied benefits for refusing to violate a "fixed, definite and immutable conviction which made the proffered employment anathema to her moral conscience." *In re Claim of Rose Chanin*, Appeal No. B-44-99-G-2840, March 21, 1949. This decision was made on a reconsideration of the case while an appeal from a previous contrary determination was being taken. The Christian Century, the leading Protestant magazine in the country, commented editorially upon the case as it was being appealed:

> "Pennsylvania's superior court is about to decide a case with far-reaching implications for freedom of conscience. It concerns the right of a state bureau to penalize a citizen for his religious beliefs. By a decision of the unemployment compensation board of review of Pennsylvania a Jewish women has been denied unemployment benefits because she refused to work on the Jewish sabbath. As in other states, the Pennsylvania law requires that unemployment compensation shall not be granted when work is available and offered. But this orthodox Jewish woman refused to work on Saturday, and therefore was debarred from the job which the bureaucrats in the state office ruled she should have taken. The legal department of the American Jewish Congress has appealed to the courts. Later, we expect to report in detail on the nature and progress of the case. It should not, however, be left to this Jewish organization to fight alone. Every church which claims to stand for religious liberty and the rights of conscience should associate itself with the appeal. For as the brief submitted by the Jewish Congress points out, the rule the Pennsylvania state board has laid down

would apply quite as much against any Christian who refused to take a job involving work on Sunday. The commonwealth of Pennsylvania, in the words of the brief, is 'exerting pressure on religious persons, compelling them to violate the dictates of their consciences by working on a day they hold sacred.' The entire religious community should call on the courts to put a stop to that sort of a thing before it becomes an established precedent." Christian Century, October 13, 1948.

B. As interpreted Sec. 1345-6 of the Ohio General Code is a "law respecting an establishment of religion."

The construction of the statute of the Ohio courts in the case at bar has never before been challenged as a violation of the establishment of religion clause of the First Amendment to the Federal Constitution. The Supreme Court of Ohio in the *Kut* case did not consider the question. Indeed, the *Kut* case was decided before the United States Supreme Court held in *Everson* v. *Board of Education*, 333 U. S. 203 (1943), that the prohibition against laws respecting an establishment of religion imposed by Congress by the First Amendment is made applicable to the states by the Fourteenth.

In both the *Everson* and *McCollum* cases, the United States Supreme Court spelled out explicitly the limitation upon the Federal and state authority imposed by the establishment of religion clause. The Supreme Court said:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, *or prefer one religion over another.* Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, or church attendance, or non-attendance. No tax in any

amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State." *Everson* case, at 15, 16; *McCollum* case at 210. (Emphasis added.)

Plaintiff submits that Sec. 1345-6, as construed by the Ohio Courts, contravenes the holdings of these cases by preferring one religion over another. As construed, the law authorizes the Unemployment Compensation Bureau to require a person observing Saturday as his day of rest to accept employment on that day. However, the Bureau may not require a person observing Sunday as his day of rest to accept employment requiring work on Sunday. Sec. 13044 of the Ohio General Code makes it a penal offense for others than Seventh Day observers to work on Sunday, and the Bureau could not compel an employee to violate the penal law as a condition to receiving unemployment benefits. Indeed, this court may judicially note that the Bureau has never disqualified an applicant for unemployment benefits for refusal to accept a position requiring work on Sunday.

The Board of Review of the Tennessee Unemployment Compensation Bureau, in considering this question, held that benefits could not be denied to a person refusing Sunday employment although he had previously worked on Sundays. *Case 12796, Tenn. R. Unemp. Comp. Interp. Serv. Ben. Vol. II, No. 9.* (The Tennessee Unemp. Comp. Act is similar to the act of Ohio.) The Board declared:

"The right of worship according to the dictates of the individual's conscience is guaranteed to him by the

> Constitution of the United States and the State of Tennessee. Working on the Sabbath day conflicted with the conscientious beliefs of this claimant."

Thus, the Ohio Unemployment Compensation Law which is here challenged, as construed, is tantamount to a declaration that only the Christian Sabbath (Sunday) is to be recognized as a holy day. Saturday observers must be available for work on their usual day of rest, while Sunday observers are excused. That portion of the Christian religion which observes Sunday as a day of rest is to be preferred over all other groups. This is a blatant violation of the First Amendment and of basic American tenets.

See *Case 9107 Wash. R. Unemp. Comp. Serv. Ben. Serv. Vol. 8, No. 1:*

> "There are numerous church people of other creeds who would not work on Sunday and should they be required to do so to hold their jobs, I feel sure that most courts would consider such work unsuitable, or to express it more in accord with the wording of our act: If such people were out of work on Sunday the courts would probably rule such work as not suitable and allow benefits."
>
> "Freedom of religion is guaranteed under our Constitution and any creed or church is entitled to one Sabbath per week whether it be Sunday, Saturday or some other day."

C. Plaintiff has been deprived of "equal protection of the law."

The prohibition of the Fourteenth Amendment to the Federal Constitution that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory legislation. *McPherson* v. *Blacker,* 146 U. S. 1, 39 (1892).

It was aimed at, "undue favor and individual or class privilege on the one hand, and a hostile discrimination or the operation of inequality on the other." *Truax* v. *Corrigan*, 257 U. S. 312, 333 (1921). It is not necessary that this "inequality" be contained in the language of the legislation. The constitutional requirement of equal protection is not limited to legislative action but extends to every organ of state government, executive, judiciary and administrative, as well as legislative. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). The equal protection clause prohibits not merely unequal laws but the unequal administration of equal laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *McCabe* v. *Atchison, Topeka and S. F. R. R.*, 235 U. S. 151, 160 (1914).

This principle was announced in the *Yick Wo* case, one of the monuments of American constitutional law. In that case, the Supreme Court said (118 U. S. at 373-374):

> "Though the law itself be fair on its face and impartial in its appearance, yet, if it is applied and administered by public authority with an evil and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Concededly, the Unemployment Compensation Law of Ohio is "fair on its face and impartial in its appearance." Nevertheless, as applied and administered in this case—so as to disqualify persons who observe Saturday as a holy day, from receiving compensation benefits — it must be classified as "so illegal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured . . . to all . . . by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States." *Yick Wo* case at 374.

The unemployment compensation laws have never been

applied or administered in such a way as to require a Christian applicant to be available for work on Sunday. Nor is such a course likely to be embarked upon by those in charge of administering our unemployment laws. The equal protection of the laws requires that a Jewish orthodox person be treated in the same manner, that is, that he be permitted to rest on Saturday, the Jewish Sabbath. But the Ohio Unemployment Compensation Law, challenged herein, has been construed to penalize plaintiff and other Seventh Day observers for resting on Sabbath.

The law must therefore be regarded as an "unjust and illegal discrimination between persons in similar circumstances." *Yick Wo* case at 374. It must be held to be a violation of the constitutional guarantee of equal protection of law.

Conclusion

The questions raised by plaintiff-appellant have never been passed upon by the Supreme Court of the United States. They involve fundamental constitutional rights—the rights to religious liberty and to equal treatment under the law. The State of Ohio has refused an orthodox Saturday observer unemployment compensation benefits because her religious convictions prevented her working on Saturday. Such refusal is a penalty on the exercise of religion. Plaintiff contends that it is an infringement of her religious liberty in violation of the First Amendment. Since Sunday observers are not similarly penalized she also contends that she has been deprived of equal protection of the law in violation of the Fourteenth Amendment and that an unconstitutional preference, in violation of the First Amendment, is being given to Sunday observers by the State of Ohio.

The resolution of the questions raised by plaintiff is of great importance to all orthodox Saturday observers, and to the administration of unemployment compensation laws

throughout the country. It is vital that these questions be resolved by the United States Supreme Court finally and at an early date.

It is respectfully submitted that these questions are substantial and that plaintiff's appeal should be allowed.

Respectfully submitted,

SCHERMER, GOLDSTEIN AND MILLSTONE,
1007-8 Mahoning Bank Building,
Youngstown 3, Ohio;

LEO PFEFFER,
American Jewish Congress,
15 East 84th Street,
New York 28, New York,
Attorneys for Plaintiff-Appellant.

APPENDIX "A"

IN THE COURT OF COMMON PLEAS, CASE NO. 129854

In Re: Claim of Mary Jane Heisler

Opinion

Ford, J.:

This is an appeal under G. C. 1346-4 from a decision of the Board of Review of the Ohio Bureau of Unemployment Compensation denying unemployment compensation benefits to appellant under G. C. 1345-6 d (2) which provides in part that no individual may be paid benefits for the duration of any period of unemployment with respect to which the administrator finds that such individual has refused an offer of work for which he is reasonably fitted.

Appellant was offered clerical employment at St. Elizabeth's Hospital in Youngstown for which she was qualified by training and experience and which paid the prevailing rate for that type of work. She refused the employment for the sole reason that it would require her to work on Saturday which, as an Orthodox Jewess, was contrary to her religious belief.

She has appealed to this Court on constitutional grounds set forth in an elaborate brief. The real issue, the brief contends, is whether G. C. 1345-6-A (4) as construed by the board is constitutionally invalid as in violation of the freedom of religion provisions of the United States and Ohio Constitutions. The statute reads in part: "No individual shall be entitled to any benefits unless he or she . . . is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted." This provision and that of G. C. 1345-6 d (2) on which the board specifically based its decision as stated above, may be treated together so far as the constitutional argument is concerned.

At the threshold of any consideration of the issues, I am faced with a decision of the Supreme Court of Ohio, Kut vs. Albers Super Markets, Inc., 146 O. S. 522. In that case an employee of Albers Super Markets, Inc., was employed as

an order clerk, with the special privilege of working on Sunday instead of on Saturday, because as a Jew, he observed Saturday as his Sabbath. Subsequently he became a so-called checker, which caused certain difficulties and the company offered to restore him to his former position. He refused and quit. Several days later he was referred to two companies, each of which was willing to employ him as a shipping clerk, but refused to accept him for the reason that he refused to work on Saturday.

The Court stated the question to be whether he was available during the entire week for work in his usual trade or occupation as required by G. C. 1345-6 a (4) and held he was not so available, and that the statute so construed did not violate his federal or state constitutional rights.

The Court also held he was not available for work on another ground—namely that he voluntarily quit his former employment, "thus making himself unavailable for work—a direct violation of the Statute which was not designed for the purpose of protection against unemployment that is voluntary". Thus the employee was denied unemployment compensation by the Supreme Court as not available for work under G. C. 1345-6 a (4) for two distinct reasons.

This decision was appealed to the Supreme Court of the United States where the appeal was dismissed "for the reason that the decision of the State Court sought here to be reviewed was based upon a non-federal ground adequate to support it" (329 U. S. 669).

It is true as pointed out on Page 14 of Appellant's brief, that there are two grounds of the Court's decision in the Kut case; that the constitutional ground was concurred in by five out of seven judges, and that it was not reviewed by the United States Supreme Court. Nevertheless, the Court's decision was specifically based upon both grounds and one of these grounds involves the very question urged by appellant in this case and is adverse to appellant's contentions.

I do not believe that a trial judge should under such circumstances, reach a conclusion adverse to that of his final State court of review, unless under very extraordinary circumstances. There are no such circumstances here as I see

it. This case is probably headed for review, however it be decided here, and it would serve no useful purpose to include in this opinion a discussion of the constitutional questions raised by appellant. Feeling bound, as I do, by the decision in the Kut case, I find that the decision of the Board of Review was neither unlawful nor unreasonable, nor against the manifest weight of the evidence, and it is therefore affirmed.

(S.) J. Foan,
Common Pleas Judge.

June 29, 1950.

APPENDIX "B"

IN THE COURT OF APPEALS, MAHONING COUNTY, OHIO

No. 3417

In Re: Claim of Mary Jane Heisler, *Plaintiff-Appellant,*

vs.

Board of Review, Bureau of Unemployment Compensation, *Defendant-Appellee*

Journal Entry

This cause came on for hearing on the appeal on question of law from the Court of Common Pleas of Mahoning County, Ohio, the assignments of error, the certified transcript of the record of the proceedings pertaining to the decision of the Board of Review, Bureau of Unemployment Compensation, and on consideration of the brief and arguments of counsel the Court finds that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is in accord with the Law of Ohio and that the appeal of the Plaintiff-Appellant is not well taken and the same should be dismissed.

It is, therefore, ordered, adjudged, and decreed that the judgment of the Court of Common Pleas of Mahoning County, Ohio, be and the same hereby is affirmed.

To all of which the Plaintiff-Appellant excepts.

(S.) JOHN C. NICHOLS,
Judge.

LYNN B. GRIFFITH
ELMER T. PHILLIPS

(S.) LEO PFEFFER,
(S.) SCHERMER, GOLDSTEIN & MILLSTONE,
Attorney for Plaintiff-Appellant.
C. WILLIAM O'NEILL,
Attorney General.
(S.) JOHN W. HARDWICK,
Assistant Attorney General,
Attorney for Board of Review.

APPENDIX "C"

THE SUPREME COURT OF THE STATE OF OHIO

January Term, A. D. 1951

To-wit: December 12, 1951

THE STATE OF OHIO
City of Columbus

No. 32819

MARY JANE HEISLER, *Plaintiff-Appellant,*

vs.

BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION,
Defendant-Appellee

Appeal from the Court of Appeals of Mahoning County

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Mahoning County as

upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed sua sponte for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended.

Ordered, That a special mandate be sent the Court of Common Pleas of Mahoning County, to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Mahoning County, "for entry."

(1319)